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HENRY MCMASTER
ATTORNEY GENERAL

February 23, 2006

The Honorable Wallace B. Scarborough
Member, House of Representatives
407 Blatt Building
Columbia, South Carolina 29211

Dear Representative Scarborough:

We received your letter expressing concern regarding lobbying efforts on behalf of the Municipal Association of South Carolina ("MASC"). Specifically, your concern appears to lie in regard to "the issue of further incorporation [of municipalities] and legislative efforts to aid that incorporation as expressed in Senate Bill 318" and the fact that "MASC has taken an absolute position against the legislation." This Bill, which the General Assembly subsequently adopted in its enactment of Act No. 77 of 2005, implements procedures for municipal incorporation in South Carolina. You point to a particular situation involving James Island, in which you believe MASC's position on Senate Bill 318 will hinder James Island's desire to become an incorporated municipality. In your letter, you state: "Twice before, the people of James Island have voted to incorporate only to be turned away by the Courts. Yet, MASC, presumably by using public funds, seeks to halt the will of the majority of the citizens of James Island."

Your letter describes MASC as a non-profit organization that enjoys tax exempt status under the Internal Revenue Code. MASC's web site states it

> represents and serves the state's 268 incorporated municipalities. The Association is dedicated to the principle of its founding members: to offer the services, programs and products that will give municipal officials the knowledge, experience and tools for enabling the most efficient and effective operation of their municipalities in the complex world of municipal government.

In regard to MASC's funding, you state:

> MASC, based on available information, is funded by two sources of revenue. First, dues paid directly by the member municipalities from whatever income sources those municipalities have available to them. These dues constitute less than 5% of the Association's budget.

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Request

> Second, various 'franchise fees' paid to MASC constitutes the remainder of MASC budget. Based on the information I have before me, these fees are withheld by the agency (telecommunication companies, cable providers, insurance carriers, etc.) collecting them on behalf of various municipalities, with the authority of the municipal government sent to MASC with the consent of the municipality.

In your letter, you request an opinion of this Office addressing whether MASC operates using public funds and if so, whether MASC legally may use public funds to advocate the position of its members before the South Carolina General Assembly.

Law/Analysis

Your initial concern, as presented in your letter, is: "Does MASC use public funds to operate?" Your letter provides funding for MASC comes from dues paid directly from the member municipalities and from franchise fees, which are "collected on behalf of various municipalities, with the authority of the municipal government and sent to MASC with the consent of the municipality." Accordingly, we acknowledge MASC receives public funds from its member municipalities.

In your letter, you imply MASC not only receives public funds, but in receiving such funds MASC becomes restricted in how it may expend these funds. In essence, your letter alludes that restrictions on the expenditure of funds that apply to the municipalities, as public bodies, also apply to the MASC. In an opinion of this Office dated December 21, 1998, we recognized MASC as a private organization possessing "no statutory status." Op. S.C. Atty. Gen., December 21, 1998. Generally, receipt of public funds by a private entity does not cause the entity to lose its private character. See Weston v. Carolina Research and Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991); Trustees of the Columbia Academy v. Board of Trustees of Richland County Sch. Dist. No. 1, 262 S.C. 117, 126, 202 S.E.2d 860, 864 (1974). Thus, even though MASC receives public funds, receipt of these funds does not impose the same restrictions on MASC's expenditures as would be imposed on a municipality's expenditures. Nevertheless, under our analysis, as presented below, if we find a municipality has authority to expend public funds for legislative activity, we presume the municipality has authority to allocate funds to MASC, which engages in legislative activities on its behalf. Therefore, we must address whether a municipality has the authority to engage in and appropriate funds for legislative activity either directly or through MASC.

We found no statute giving municipalities the authority to engage in legislative activity. However, we also did not find a statute prohibiting such activity. Thus, we must look to the implied powers of a municipality to determine whether it may engage in legislative activity and expend public funds for such activity.

Article VIII, section 17 of the South Carolina Constitution (1976) provides: "The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution." In addition, the General Assembly enacted section 5-7-30 of the South Carolina Code (2004), which states:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it . . . .

The South Carolina Supreme Court held:

> [T]aken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.

Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993).

South Carolina courts have yet to address whether municipalities have the authority to engage in legislative activity, either directly or through MASC. However, in an opinion of this Office dated November 2, 1990, we addressed the related issue of whether employees of MASC and employees of the South Carolina Association of Counties (the "Association of Counties") were required to register as lobbyists in order to ask or urge members of the South Carolina General Assembly to vote for passage of the Local Option Sales Tax. South Carolina law requires "[a]ny person who acts as a lobbyist" to register with the State Ethics Commission. S.C. Code Ann. § 2-17-20 (2005). Under the law at the time of our November 2, 1990 opinion, certain individuals were exempt from registration. The exempt individuals included "any duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or public service district, when appearing only and solely on matters pertaining to his office . . . ." S.C. Code § 2-17-20(c) (1986). In that opinion, we determined this exemption applied to employees of MASC and the Association of Counties "by virtue of their being paid from municipal funds and serving at the pleasure of a

board of directors composed of municipal officials." Op. S.C. Atty. Gen., November 2, 1990. We relied on Peacock v. Georgia Municipal Association Inc., 279 S.E.2d 434, 437 (Ga. 1981), as discussed further below, and determined if the lobbying activities are solely and only pertain to the public office and public duties of those officials or employees, then presumably such activities are not illegal and did not require registration. Id. Thus, the statute and our opinion contemplate a municipality's authority to engage in legislative activity directly or though MASC.

In 1991, the General Assembly enacted "The Ethics, Government Accountability, and Campaign Reform Act of 1991." 1991 S.C. Acts page no. 1578. This Act amended the registration requirement and removed the provision exempting certain individuals from registration. However, we find our opinion remains pertinent in determining whether or not a municipality may engage in legislative activities before the General Assembly. In amending the statute, the General Assembly did not specifically deny municipalities the right to lobby. Legislative inaction can, in certain circumstances evidence the Legislature's intent. See Wigfall v. Tideland Util. Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation."). We presume the General Assembly was aware of our opinion prior to amending the statute, yet it took no action to prohibit municipalities from engaging in legislative activity.

We acknowledge Article VIII and section 5-7-30 convey broad powers to municipalities, which we presume would include authority to engage in legislative activity. In addition, our November 2, 1990 opinion supports this conclusion. However, a municipality's exercise of this authority is limited by the requirement that expenditures for such activities be aimed at the fulfillment of its corporate purposes. Our courts recognize a distinction between local functions and general functions of the State. "Generally speaking, it may be said that purposes and activities designed in the main to aid the state in carrying out its governmental functions and policies do not represent corporate purposes, while purposes and activities designed primarily for the exclusive or principal benefit of the inhabitants of a particular municipality do." Kleckley v. Pulliam, 265 S.C. 177, 185, 217 S.E.2d 217, 221 (1975) (quoting 71 Am. Jur. 2d State and Local Taxation § 64) (quotations omitted)). In an opinion of this Office, we stated: "No governing body may spend public funds . . . beyond its corporate purpose." Op. S.C. Atty. Gen., July 28, 2003.

In addition, the South Carolina Constitution imposes the requirement that expenditures of public funds must be for a public purpose. Article X, section 5 of the South Carolina Constitution (Supp. 2005) requires any tax levied to be for a public purpose. In addition, Article X, section 11 of the South Carolina Constitution (Supp. 2005) provides, in pertinent part: "The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution." The South Carolina Supreme Court interpreted this provision to prohibit the expenditure of public funds for the primary benefit of private parties. State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981).

Generally, South Carolina courts give deference to a legislative body in its determination of a public purpose. WDW Prop. v. City of Sumter, 342 S.C. 6, 12-13, 535 S.E.2d 631, 634 (2000). In Nichols v. South Carolina Research Authority, 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986), our Supreme Court affirmed the test for the determination of a public purpose, as set forth in a prior opinion.

> The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

Id. (quoting Byrd v. Florence County, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)).

South Carolina courts have not addressed whether or not expending funds for purposes of influencing the General Assembly comports with a municipality's corporate and public purposes. However, other jurisdictions found such activities generally necessary to the administration of local government, and thus, permissible by local governments either directly or through various associations of which they are members. In Peacock v. Georgia Municipal Association, Inc., 279 S.E.2d 434, 437 (Ga. 1981), the Georgia Supreme Court addressed a situation similar to the one at hand. In that case, the Court examined whether the legislative activities Georgia Municipal Association and the Association of County Commissioners of Georgia on behalf of their members were illegal. Id. That Court held: "We find that in today's complex world the activities carried on by [the Georgia Municipal Association and the Association of County Commissioners of Georgia] constitute necessary activities for the administration of county government." That Court further stated:

> Elected officials who participate as members and officers of defendant organizations are elected by the voters for the purpose of performing certain public functions. Among the functions of officers of municipal corporations or counties is to represent the views of the constituents to law-making bodies in regard to pending issues affecting the political subdivision. Since it is the responsibility of the government entities to represent the views of their constituents in this manner, it is proper to carry out this function in concert with officials of other governmental bodies. If the electors of a political subdivision disagree with the position taken by their officials, the remedy is at the ballot box.

Id. at 437-38. The North Carolina Court of Appeals came to the same conclusion in North Carolina ex rel. Horne v. Chafin, 302 S.E.2d 281 (N.C. App. 1983), addressing legislative activities performed

directly by a municipality. In that decision, the Court addressed whether a municipality's financing of a reception honoring the North Carolina General Assembly to promote the legislative goals of the municipality was an illegal use of public funds. Id. That Court determined, in agreement with the Georgia Supreme Court's decision cited above:.

> Local government officials have a duty to represent their constituents, and presenting local interests to the state legislators in hope of getting favorable bills passed in the General Assembly is obviously a public and not a private purpose. The alleged extravagance of the reception does not convert the public purpose to a private one. Plaintiff's remedy is to air his opinion at the ballot box.

Id. at 284. Courts in Kansas and Illinois also recognized municipalities' authority to engage in legislative activity, if such activity comports with a public purpose. See Hays v. City of Kalamazoo, 25 N.W.2d 787, 795 (Mi. 1947) (involving a suit to enjoin the city of Kalamazoo from annually contributing to a state municipal league, which promoted or opposed legislation on behalf of the city. "[T]he city of Kalamazoo is invested with powers of a proprietary nature, which it is required to exercise for the use and benefit of its people. Legislation, pending or anticipated, affecting the performance of such functions, necessarily concerns the city."); Meehan v. Parsons, 111 N.E. 529 (Ill. 1916) (addressing a mayor's ability to lobby the United States Congress for funding of levees. "The interests of the city of Cairo would undoubtedly be affected by whatever action Congress should choose to take in reference to the appropriation for the building of its levees. Should Congress refuse to appropriate any sum whatever, the whole burden of building and maintaining its levees would rest upon the city."). Additionally, various state Attorney Generals' opinions indicated the propriety of the expenditure of public funds for legislative activities. See Op. Kan. Atty. Gen., September 1, 1981 (finding lobbying activities as within a county's home rule powers as long as they are for a public purpose, and such activities are for a public purpose "where the goal of the counties comprising said group is to affect pending legislation which could adversely impact the financial interests of their county governments."); Op. Idaho Atty. Gen., July 19, 1989 ("Payment of dues to municipal leagues or associations by cities and counties is an expenditure for a public purpose permitted by the Idaho Constitution and statutes. The use of those dues for lobbying efforts is permissible if the lobbying is for an appropriate public purpose.").

Based on the broad discretion given to municipalities, the relevant constitutional and statutory provisions, and the lack of authority prohibiting a municipality from engaging in legislative activity, we are of the opinion that a municipality has the implied power to engage in legislative activity. In addition, we agree with the jurisdictions cited above finding that engaging in legislative activities instrumental in the administration of local government. However, we also believe these activities must be limited not only to the fulfillment of public, rather than private functions, but also to the fulfillment of the municipality's corporate purposes. Thus, in our opinion, a municipality's legislative activities must be limited to issues of local importance that fall within municipal officer's duties to represent their constituents.

In your letter, you asked: "was MASC's public position against S.318, like its continued opposition to the incorporation of James Island, a misuse of public funds?" MASC is, as we stated previously, a private organization. Thus, we presume standing alone, MASC may take any position it wishes to take. However, MASC represents its member municipalities in taking this position. Therefore, in order to determine the propriety of the municipalities decision to allocate public funds to MASC for this purpose, we must determine whether each member municipality serves a corporate and public purpose in appropriating funds to MASC for this endeavor. Such determination would be extremely fact intensive and as such, is beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., August 31, 2005 (stating factual inquiries are beyond the scope of an opinion of the Attorney General's Office). However, we presume a court would employ the authorities as cited above in making this determination.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General